INDEX

Subject Index

Cases Cited

Cases Cited

Statutes Cited

Miscellaneous Citation

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No.

■

CLEM CUMMINGS, *Appellant*

v.

STATE OF MISSISSIPPI, *Appellee*

■

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 (1) of the Supreme Court of the United States, as amended April 6, 1942, appellant files a *statement as to jurisdiction* disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)].

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error.

Mississippi Legislation Questioned

The statute, the constitutionality and validity of which is drawn in question here, is Chapter 178 of the General Laws of Mississippi duly enacted at the regular session of the Mississippi Legislature. The statute as originally enacted (House Bill 689) reads as follows:

"HOUSE BILL No. 689

"AN ACT to secure peace and safety of the United States and state of Mississippi during war; to prohibit acts detrimental to public peace and safety, and to provide punishment for same.

"WHEREAS, The imperial government of Japan and governments of Germany and Italy, and associated nations, have expressly declared war upon these United States, a union of which the state of Mississippi is a part; and

"WHEREAS, The very life and existence of these United States and the state of Mississippi are threatened by the said foreign powers, and there is now existing an acute unquestionable emergency in these United States and the state of Mississippi; and

"WHEREAS, The preservation of the state of Mississippi and these United States depends upon a unity of effort on the part of all the citizens thereof, public necessity requires that the legislative departments of the state of Mississippi and of these United States shall enact all laws and do all things necessary to insure domestic tranquility and promote the common defense and general welfare of the people thereof; and

"WHEREAS, All persons who either by word or deed weaken the morale or unity of our people, or adversely affect their honor and respect for the flag or government of these United States or of the state of Mississippi are a menace to the safety of this state and these United States.

"NOW, THEREFORE,

"Section 1. *Be it enacted by the Legislature of the State of Mississippi,* That any person who individually, or as a member of any organization, association, or otherwise, shall intentionally preach, teach, or disseminate any teachings, creed, theory, or set of alleged principles, orally, or by means of a phonograph or other contrivance of any kind or nature, or by any other means or method, or by the distribution of any sort of literature, or written or printed matter, designed and calculated to encourage violence, sabotage, or disloyalty to the government of the United States, or the state of Mississippi, or who by action or speech, advocates the cause of the enemies of the United States or who gives information as to the military operations, or plans of defense or military secrets of the nation or this state, by speech, letter, map or picture which would incite any sort of racial distrust, disorder, prejudices or hatreds, or which reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag or government of the United States, or of the state of Mississippi, shall be guilty of a felony and punished by imprisonment in the state penitentiary until treaty of peace be declared by the United States but such imprisonment shall not exceed ten years.

"Sec. 2. Any person in possession of maps or parts of maps having marked thereon any industrial, storage or manufacturing plant, power or gas plant, facilities for waterworks, sewerage or sewerage disposal, trans-

portation terminals, shops or facilities, oil and gas pumping and storage station, or government or public buildings, which may be used for information to the enemy or to aid the enemy, without proper authority, shall be prima facie evidence of the intention of such person to violate the law and, upon conviction of such possession, shall be punished by a fine not exceeding $1,000.00, or imprisonment in the county jail not exceeding one year, or both such fine and imprisonment.

"Sec. 3. That any unnaturalized alien who is questioned on an alleged violation of the provisions of this act by a duly elected, acting and qualified law enforcement officer, and refuses to give information as his or her age, birthplace, parents, places of residence for the last five years; source, amount and extent of salary, compensation, livelihood, and means of travel, if any; marital status, or who answers falsely any such question, or refuses to submit to fingerprinting, or who defies or obstructs the law, or any officer of the law while he is performing his duties with relation to the provisions of this act shall be guilty of obstructing justice and shall be punished therefor as now provided by law.

"Sec. 4. That this act is cumulative and does not repeal or interfere with any existing law, but is in addition thereto.

"Sec. 5. Except as to cases then pending in court this act shall expire after the duration of the present war.

"Sec. 6. If any word, line, section or part of this act should hereafter be declared unconstitutional by the courts, such decision shall not be construed so as to render invalid the remainder of this act.

"Sec. 7. That this act shall take effect and be in force from and after its passage.

"Approved March 20, 1942."

The Circuit Court which is the trial court and the appellate court, the Supreme Court of Mississippi, held the statute was not unconstitutional and that it was not superseded by federal statutes on the same subject. Such courts refused to hold that the statute on its face and as construed and applied to the facts abridged the rights of freedom to worship Almighty God, freedom of conscience, of press and of speech contrary to the First and Fourteenth Amendments to the United States Constitution. Said courts also held that the statute was not vague, indefinite, too general and a dragnet as construed and applied.

Timeliness

The judgment of the Supreme Court of Mississippi was rendered and entered January 25, 1943. (R. 145) The petition for appeal and other papers required by the rules of this Court are filed within three months from the date of such judgment. R. 146-159.

Opinions

The opinion of the Supreme Court of Mississippi is reported in 194 Miss ... and in 11 S. 2d 683. It also appears in the record at pages 130 to 144. The opinion is also attached hereto as Appendix to this statement.

Statement of Nature of the Case and Rulings of Court Bringing Case Within Jurisdictional Provisions Relied Upon

In the Circuit Court of Warren County, Mississippi, the appellant. Clem Cummings, was indicted by the grand jury. The indictment returned and filed reads as follows:

Report of Indictment

And afterwards, to-wit: On the 10th day of July, A.D., 1942, the same being a day of the regular July Term, 1942, the following entry was made on the Minutes of said Court on page 215 of Minute Book "A-2", to-wit:

The Grand Jurors of the State of Mississippi, elected, summoned, empanelled, sworn and charged to inquire in and for the body of the County of Warren, came into Court attended by their proper officer, there being Sixteen (16) of their number present, and upon their oaths and through their Foreman presented to the Court Six (6) True Bills of Indictment, which were endorsed a "True Bill" and the same signed, were presented to the Court, and filed by the Clerk with his endorsement of filing thereon, and numbered as follows to-wit: 4278, 4279, 4280, 4281, 4282 and 4283.

The indictment numbered 4280 is the indictment against the defendant herein, and it is in the words and figures as follows, to-wit:

CIRCUIT COURT JULY TERM, 1942
STATE OF MISSISSIPPI, WARREN COUNTY

The Grand Jurors of the State of Mississippi, elected, summoned, empaneled, sworn and charged to inquire in and for the body of Warren County, State of Mississippi, at the term aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present that Clem Cummings, late of the County aforesaid, on or before the 9th day of July, A.D. 1942, with force and arms, in the County aforesaid, and within the jurisdiction of this Court, did, then and there wilfully, unlawfully, feloniously and intentionally distribute printed matter, designed and calculated to encourage disloyalty to the United States Government, and the State of Mississippi, which said printed matter so distributed was then and there in book form, designated or entitled: "Children", and said book entitled: "Children" being attached hereto and made a part of said indictment as though copied fully herein; and various other books, leaflets and pamphlets, a further exact description of which said books, leaflets and pamphlets aforesaid is to the Grand-jurors unknown, and which said various other books, leaflets and pamphlets being attached hereto and made a part hereof as though copied fully herein, and all of which reasonably tended to create an attitude of stubborn refusal to salute, honor or respect the flag or Government of the United States, or of the State of Mississippi.

Contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

(Signed) T. J. Lawrence
District Attorney.

Appellant filed and urged a motion to quash the indictment (R. 11-14), which was overruled and exception allowed. (R. 15) A demurrer to the indictment was duly filed and urged (R. 7-11), which was overruled and exception allowed. R. 11.

Appellant pleaded "not guilty". R. 41.

At the close of the State's evidence appellant filed a motion for peremptory instruction requesting the trial court to exclude all the evidence and instructing the jury to return a verdict of "not guilty" (R. 15-18), which was overruled and exception allowed. (R. 19) At the close of the entire case and when both parties had rested their case, appellant duly filed a motion for directed verdict, requesting the court to exclude all the evidence and direct the jury to return a verdict of "not guilty" (R. 29-32), which was overruled and exception allowed. R. 33.

Under grounds 1 and 2 of the motion to quash (R. 12-13), the demurrer (R. 8), motion for peremptory instruction (R. 16-17), and motion for directed verdict (R. 30-31) appellant attacked the statute on the grounds that on its face, by its terms, and as construed and applied it abridged the rights of freedom of speech, press and of worship of Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution. R. 12-13; 8; 16-17; 30-31.

Under grounds 4 and 5 of the motion to quash (R. 13), the demurrer (R. 9), motion for peremptory instruction (R. 17), and motion for directed verdict (R. 31) appellant attacked the statute as being unconstitutional because, on its face and as construed and applied, it was and is vague, indefinite, too general, a dragnet and permitted speculation, all of which violated Section 1 of the Fourteenth Amendment to the United States Constitution. R. 9; 13; 17; 31.

In the Supreme Court of Mississippi, under assignments of error numbers 1, 2, 3 and 4 the appellant complains respectively of the error of the trial court in overruling the motion to quash, the demurrer, the motion for peremptory instruction and the motion for directed verdict. (R. 148) Under grounds 9 and 10 of the assignments of error it is claimed specifically that the trial court should have held that the statute on its face and as construed and applied abridged the rights of freedom of speech, press and worship, contrary to the First and Fourteenth Amendments. (R. 149) Under ground 8 of the assignments of error it is claimed specifically that the trial court should have held that the statute was vague, indefinite and a dragnet in violation of the Fourteenth Amendment. R. 149.

The Supreme Court of Mississippi considered each one of the assignments of error above described and numbered, and overruled the same. (R. 130-131, 145) The Court held that on its face and by its terms the statute did not abridge the rights of freedom of speech and press, contrary to the Federal Constitution. The Court held that as construed and applied the rights of freedom of speech, and of press were not abridged, contrary to the First and Fourteenth Amendments. The Court held that freedom to worship Almighty God was not impaired by the conviction and judgment. R. 130-131.

Thereby the court of last resort in the State of Mississippi sustained the application of the statute to appellant and decided in favor of validity of the same.

Statement of Facts

Clem Cummings is one of Jehovah's witnesses, an ordained minister of the Watch Tower Bible and Tract Society. Since December 1941 he has been in full-time evangelical work of calling from house to house in the city of Vicksburg. Before entering the full-time ministry he had worked for the Illinois Terminal Railroad Company for twenty-three years at Urbana, Illinois, his native home. (R. 98, 114) He became one of Jehovah's witnesses and began preaching in 1928 in Illinois. Before that he had never belonged to any religion. (R. 98) His wife works with him full time and aids him in preaching from house to house. So does his son.

Appellant is a duly ordained minister. First by Jehovah God and secondly by the Watch Tower Bible and Tract Society, the earthly source of his ordination, which issued to him a certificate of ordination, a copy of which is in the record. When Jesus Christ was upon earth, according to the record in Luke 4: 18, He quoted Isaiah 61: 1, 2 as his heavenly or spiritual ordination of God, to wit: "The spirit of the Lord God is upon me; because the Lord hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of Lord, and the day of vengeance of our God; to comfort all that mourn." Appellant claims this same Scriptural authority as a footstep follower of Christ Jesus. R. 102.

The book *Children,* for distributing which appellant was indicted, tried and convicted, explains the matter thus:

"The word *ordained,* as defined by the best authority (Doctor Strong), means 'to make; to appoint; to anoint; to constitute; to commission'. Only the Lord,

therefore, could truly and properly ordain one to become a witness for Him. [page 225] . . .

"One who becomes a true and faithful servant of God and Christ, and who has received the spirit of the Lord, is ordained or commissioned to preach the good news of the Kingdom and to magnify Jehovah's name, and hence is an 'ordained minister' of the gospel.

"Not only are such persons appointed and commissioned by the Lord to preach the gospel of the Kingdom, but such are emphatically commanded that they must preach the gospel of this kingdom. (Matthew 24: 14) When Christ Jesus appeared at the temple and put his consecrated followers to the test, he sent forth the approved ones to 'offer unto the Lord an offering in righteousness'. (Malachi 3: 3) Such means that they must employ their lips and every other faculty possessed to bear witness to the truth of Jehovah's name and his kingdom. (Hebrews 13: 15) Each one of such is appointed and commissioned to preach the good news by telling the people of the Kingdom, or THEOCRATIC GOVERNMENT. This positive command the Lord Jesus gives, to wit: 'And this gospel of the kingdom shall be preached in all the world for a witness unto all nations; and then shall the end come.'—Matthew 24: 14. [page 226]

"All such sincere followers of Christ Jesus who obey this commandment are Jehovah's witnesses, bearing testimony to his name and to his kingdom. No earthly power has any authority to interfere with their preaching 'this gospel', because they are the witnesses of the Most High, or Almighty God, acting under his commandment." [page 227]

Clem Cummings admitted that in the performance of the above commission he used the book *Children* and other publications containing explanation of God's Word as a substitute for oral sermons which he left at

the homes of the people. This was done, not to teach disloyalty, but rather, to assist persons of good-will toward Almighty God to have a knowledge of God's Word, the Bible, and to acknowledge the Bible and Jehovah God the Almighty as its Author and the Supreme One and Creator, and Christ Jesus as Jehovah's Great Prophet. (Deuteronomy 18:15; Acts 3:22, 23) (R. 98) It was not the intention of appellant to cause anybody to become disloyal or disrespectful to, or to stubbornly refuse to salute the flag. R. 98, 114.

Because of engaging in this charitable, benevolent and Christian activity the public officials of Vicksburg got stirred up. Appellant was arrested on April 11, 1942, but not charged with any specific offense. No witnesses appeared before him to complain against him. He was placed in the custody of Tom Byrd the jailer at Vicksburg. While thus incarcerated Byrd asked appellant to give him some literature. Thereupon Cummings handed the jailer the book entitled *Children* and also gave him a magazine entitled *The Watchtower*. These were given free and without charge. The jailer then asked Cummings if he would salute the flag and what was his authority. Cummings answered by quoting the Scripture, Exodus 20:1, 5. (R. 48) Byrd testified against appellant concerning these facts and added that reading the book *Children* and listening to Cummings talk did not affect him one way or the other, did not cause him to have less respect for his government, or any less respect for the country, and that it did not cause him to have an attitude of stubborn refusal to salute the flag. While on the witness stand jailer Byrd read the book *Children* the objectionable part, to wit:

"Satan knows that his time is short, and therefore he is desperately trying to turn all persons, includ-

ing the children, against God. (Revelation 12:12, 17) Therefore Satan influences public officials and others to compel little children to indulge in idolatrous practices by bowing down to some image or thing, such as saluting flags and hailing men, and which is in direct violation of God's commandment. (Exodus 20:1-5) That is why in the last few years rules are made and enforced in the public schools compelling children of the Jonadabs, who are in a covenant to do God's will, to indulge in the idolatrous practice of flag-saluting and hailing men." [page 314] R. 45, 46.

'Jonadabs' is the Biblical name prophetically used to describe today those persons of good-will toward Almighty God who take a definite and positive stand for righteousness and who the Lord Jesus said would be rewarded with life eternal on the earth because of kindness shown toward those of His brethren and followers.[1]

The book was introduced in evidence. It is 368 pages in length and is filled with Scriptures from cover to cover. It is a romance in righteousness described in dialogue form between a clean, well-educated, athletic young man and an equally well-educated, beautiful and lovable young woman. In this setting with the two characters, John and Eunice, contemplating marriage they together undertake a study of the Bible. The book is a record of the explanations made to one another as they pursue this course of study. The book contains approximately 900 citations of scriptures. In this study there is revealed to them their duties, privileges, responsibilities and hopes for the future—which are very bright. They learn what they must do to survive the Battle of Armageddon. They learn of the creation of the things recorded in the first three chapters of the

[1] See Chapter 6 of the book *Children*.

Bible. That 'Jehovah created the heavens and formed the earth; He created it not in vain but to be inhabited.' (Isaiah 45:18) That mankind was created perfect, male and female, and placed in Paradise as a home, with perfect fruit, eating of which would sustain them in everlasting life on earth. That Lucifer, the 'son of morning', an angelic creature was appointed as overlord or "anointed cherub that covereth." (Ezekiel 28:13, 14) At the time of assignment to this privilege he was faithful and perfect in all his ways. (Ezekiel 28:15) That the Bible records that Lucifer became covetous and ambitious. He was egotistical and much puffed up because of the office conferred on him. (Ezekiel 28:17) He desired the worship and devotion that man was giving Jehovah. "I will ascend into heaven, I will exalt my throne above the stars of God; I will sit also upon the mount of the congregation, in the sides of the north; I will ascend above the heights of the clouds; I will be like the Most High." (Isaiah 14:13, 14) See also Isaiah 14:12-20; Ezekiel 28:11-19. This was treason in the highest degree. To carry out the conspiracy to turn man away from Almighty God he resorted to deception and told the first lie (John 8:44), by persuading man to partake of the forbidden fruit, and said: "Ye shall not surely die." (Genesis 3:3, 4) This resulted in forfeiture of the right to everlasting life and condemnation to ultimate death. Thus all children ever after were born subject to this judgment and they too in time did die.

Satan then challenged Jehovah that he as overlord of mankind could cause every man of every generation to curse God. God accepted the challenge and has given Satan an opportunity to prove it.

Thereafter Jehovah God caused to be recorded the history of His witnesses, including the nation of Israel and all his faithful servants and prophets operating

under this challenge. All human creatures being free moral agents have been left with the responsibility to choose whom they will serve, Satan or Jehovah. Satan's challenge and the voluntary acceptance thereof by Jehovah's witnesses in all ages has brought much suffering, distress and sorrow upon them but proved Jehovah to be truthful and the Devil a liar. It proved that God can put men on earth who will maintain their integrity. Jehovah did not leave mankind in this condition without hope. He promised and did send a redeemer of mankind from such judgment, who also proved His integrity under persecution and received the reward of being invisible king of THE THEOCRACY, the government of righteousness, to be fully established in the earth in due time. Throughout the centuries Satan has developed a strong invisible opposition government that controls the nations of mankind. (2 Corinthians 4:4; Ephesians 6:12) The history of centuries of this rule is filled with accounts of violence, oppression and deprivation of the rights of conscience.

That Jehovah God is now taking out from among all nations of the earth a people for His name, Jehovah, described as the meek. "The meek shall inherit the earth." (Psalm 37:9-11) This takes place 'at Armageddon' when the Devil's organizations are destroyed off the face of the earth and instead thereof the kingdom of Christ Jesus permanently established by Him, not man. (Daniel 2:44) Through this Redeemer-King all obedient persons will be restored to paradise, which the original man lost, and live eternally on the earth in peace—of which more is said later.

This same message of God's kingdom as the only hope of humanity has been preached throughout sixty centuries in opposition to the religious precepts of Godless rulers who have brought much woe upon Jehovah's witnesses during all those centuries.

In the book Jehovah's witnesses of today are identified as no members of any sect or cult but that they are that group of Christians selected out of the world by Almighty God and are not subject to any human organization or human power and that their primary allegiance is to Almighty God, whom they must obey. Abel is described as the first witness for Jehovah and all faithful prophets of Jehovah from the day of Abel to John the Baptist, all of whom lived prior to Jesus, are specifically named as witnesses at Hebrews chapter 11. It shows that faithful servants of Jehovah since the beginning of time have been in the minority and bitterly persecuted, mocked, scourged, beaten, stoned, hanged and otherwise killed, and torn asunder by the popular majority of their time for the reason that said witnesses obeyed God rather than man. It is pointed out that at all times those who have indulged in reproaching the name of Almighty God and Christ by persecuting of God's witnesses have been and are those persons who indulge in and practice religion. Religionists killed Jesus, stoned Stephen and put faithful Christians to death ever thereafter. The religious dictator of Germany is described as the leading modern-day persecutor of true Christians, Jehovah's witnesses. A distinction is made between religion and Christianity. The former is following in the course mapped by precepts of men while the latter is taking the course dictated by the unadulterated word of Almighty God, the Bible, and following in the footsteps of Jesus. Religionists claim to follow Christ Jesus. Their course of action proves they do not, but follow the Devil. The Christian proves his faith by his works and practices what the Bible teaches by preaching God's kingdom message continuously, publicly and from house to house, faithfully and unto death, regardless of all opposition.

The foregoing history of religious persecution of

Christians is then brought down to modern date in the United States showing how Jehovah's witnesses have been arrested, mobbed and beaten in the land of the free and the home of the brave because of their refusal to violate their covenant to preach God's kingdom message and their refusal to violate their conscience. The facts notoriously known concerning the expulsion from school and the denial of public education to many thousands of children are mentioned. In this setting the objectionable portions of the *Children* book are found, page 314, which are the words objected to by the complaining witnesses. Following the "objectionable" statement is admonition of the Lord to parents as to their responsibility of educating their children in the Word of God—to teach them to faithfully keep their covenant and deal honestly, morally, justly and righteously with all with whom they come in contact and, above all, to honor the name of Jehovah regardless of the cost.

The reward for their faithfulness in thus preaching the good news or gospel is the joy of seeing the name and word of Almighty God vindicated in the destruction of all His enemies in His battle at Armageddon and their own miraculous deliverance by Jehovah. This final act will result in the opening up of the earth to the expansion of God's kingdom in completeness under Christ Jesus, the invisible King in heaven, when the earthly visible part of such government of righteousness will be ruled over by the resurrected *faithful men of old,* the witnesses mentioned in the 11th chapter of Hebrews, who are described as *princes in all the earth.* (Psalm 45:16; Isaiah 32:1) Under such earthly government of Jehovah God the people will be restored to health, perfection of body and mind, have unending life, and enjoy everlasting peace and prosperity.

The earth was never filled with a righteous and per-

fect race because of Adam's transgression before bringing forth children. It is God's intention that the earth shall be filled with a perfect and righteous race of people. The privilege of thus filling the earth will be granted to those now on the earth who survive that greatest of all battles at Armageddon. They shall marry and bring forth children and subdue the earth, beautify it by cultivation, landscaping its surface under the Creator's supervision until the entire globe is transformed into a veritable paradise as was the Garden of Eden. All who live will praise Jehovah God, the Eternal One. Thus ends the book *Children.*

The delivery of the book by appellant to the jailer was made the basis of the prosecution instituted against appellant. At the preliminary hearing the jailer testified against appellant. The book was shown by the jailer to George E. Hogaboom, the Chief of Police of Vicksburg, who attended the preliminary hearing also. The chief of police said that the contents of the book did not cause him to "think any less of his country." R.

At the preliminary hearing additional evidence was given against the appellant by the "peace" officers and the prosecuting attorney and the magistrate presiding. This proceeding is best described by Judge Alexander in his dissenting opinion, to wit, "It is of interest to note in this connection that this 'symptom' was revealed by the resourcefulness of the prosecutors who at the preliminary hearing displayed in the courtroom a large American Flag and at an opportune moment requested all present to stand and salute. The convictions of appellant were thus 'smoked out' when he remained seated and became at once a witness to his convictions and for the state." R. 58.

The state claimed that in the midst of this ceremony when called upon to salute and during the explanation

that followed the appellant said, 'We are teaching not to salute the flag and we refuse to salute it.' (R. 63) Appellant denied this emphatically. (R. 101, 110) It is noticed that the literature does not teach others not to salute the flag. The book and booklets *explain the reason why Jehovah's witnesses cannot salute the flag.* No one is told not to salute. All are accorded the right and privilege of saluting who desire to salute. Of this Judge Alexander said: "Both the book and the appellant himself, while professing allegiance to and respect for the flag, conceded the right of non-adherents to follow their own convictions. A careful reading of this book [*Children*] fails to impress me that it teaches dishonor to the flag but respect for a faith." R. 133.

Appellant remains separate and apart from the world as a minister of Jehovah God by refusing to participate in political activity and refusing to influence in any way the governments of this world. It was testified that the literature was not subversive of the United States Government. Appellant did not discuss or raise the flag-salute question with the people when approaching them but confined his conversation to preaching the gospel. When the question was brought up by others he always gave a ready answer. (R. 101) Since the indictment does not allege any violation of the statute by oral statement but confines the prosecution to the literature a summary of the evidence on such oral statements will not be necessary. R. 4.

The record is silent as to any testimony showing that anyone read the book and was influenced thereby to assume an attitude of stubborn refusal to salute the flag. There is no evidence that anyone even tended in that direction by reading the literature. R. 48, 61, 65.

Grounds and Decisions Sustaining Jurisdiction and Showing that Substantial Federal Questions are Involved

FIRST

The courts below should have held that Section 1 of the statute is void on its face because by its terms it unduly abridges the freedom of speech and of the press, contrary to the First and Fourteenth Amendments to the United States Constitution.

Decisions Cited

Stromberg v. California, 283 U. S. 359

Herndon v. Lowry, 301 U. S. 242

Near v. Minnesota, 283 U. S. 697

Bridges v. California, 314 U. S. 252

Thornhill v. Alabama, 310 U. S. 88

Carlson v. California, 310 U. S. 106

Schneider v. State, 308 U. S. 147

De Jonge v. Oregon, 299 U. S. 353

Schenck v. United States, 249 U. S. 47

Fiske v. Kansas, 274 U. S. 380

State v. Klapprott et al., 127 N. J. L. 395, 22 A. 2d 877

SECOND

The courts below should have held that Section 1 of the statute is unconstitutional as construed and applied to the facts and circumstances of this case because appellant's rights of freedom of speech, press and worship have been abridged, contrary to the First and Fourteenth Amendments to the United States Constitution.

Decisions Cited

Cantwell v. Connecticut, 310 U. S. 296
Schneider v. State, 308 U. S. 147
Lovell v. Griffin, 303 U. S. 444
Oney v. Oklahoma City, 120 F. 2d 861
Lynch v. Muskogee, 47 F. Supp. 589
Beeler v. Smith, 40 F. Supp. 139
Stromberg v. California, 283 U. S. 359
Herndon v. Lowry, 301 U. S. 242
Bridges v. California, 314 U. S. 252
Thornhill v. Alabama, 310 U. S. 88
Carlson v. California, 310 U. S. 106
De Jonge v. Oregon, 299 U. S. 353
Schenck v. United States, 249 U. S. 47
Fiske v. Kansas, 274 U. S. 380
Near v. Minnesota, 283 U. S. 697

THIRD

The courts below should have held that the statute is unconstitutional as construed and applied because it does not require that there be a showing of a clear, immediate and present danger that disloyalty to the government or an attitude of stubborn refusal to salute, honor or respect the flag or government or any of the other evils the statute is designed to prevent will result but allows a conviction if the court or jury believes there is a tendency to cause such at any time in the future.

Decisions Cited

Schenck v. United States, 249 U. S. 47

Bridges v. California, 314 U. S. 252

Stromberg v. California, 283 U. S. 359

Thornhill v. Alabama, 310 U. S. 88

De Jonge v. Oregon, 299 U. S. 353

Whitney v. California, 274 U. S. 357, 363-369

Herndon v. Lowry, 301 U. S. 697

FOURTH

There is no evidence whatsoever that any of the evils prohibited by the statute, to wit, disloyalty to the government or attitude of stubborn refusal to salute the flag or advocacy of the cause of the enemies will result from the words spoken by the appellant or the literature distributed by him.

Decisions Cited

Herndon v. Lowry, 301 U. S. 697

McKee v. Indiana, 37 N. E. 2d 940, ... Ind. ....

People v. Northum, 41 C. A. 2d 284,
103 Cal. Supp. 295

Butash v. State, 212 Ind. 492, ... N. E. 2d ....

Fiske v. Kansas, 274 U. S. 380

Beeler v. Smith, 40 F. Supp. 139

State v. Sentner, ... Iowa ...., 298 N. W. 813

State v. Aspelin, ... Oreg. ...., 203 P. 964

FIFTH

The convictions cannot be based upon isolated statements, oral or written, but the court must examine the entire conversations and the contents of the literature from which such statements are taken to determine the intent and meaning of the language objected to.

Decisions Cited

Schaefer v. United States, 251 U. S. 466, 482
United States v. One Book Ulysses, 72 F. 2d 705
United States v. Dennett, 39 F. 2d 564
Halsey v. New York Society, 234 N. Y. 1, 4
Klaw v. New York Press Co., 137 A. D. 466, 688
Daniel v. Moncure, 58 Mont. 193, 200

SIXTH

The general verdict will not support a conviction where the undisputed evidence shows that either ground of conviction violates the constitutional rights of appellant or where one of the provisions of the statute sustaining the conviction is unconstitutional.

Decisions Cited

Stromberg v. California, 283 U. S. 359, 363-366
Williams v. North Carolina, 63 S. Ct. 207, 210
Thornhill v. Alabama, 310 U. S. 88

SEVENTH

On its face and as construed and applied, the statute is unconstitutional because it is vague, indefinite, uncertain, too general, fails to furnish ascertainable standard of guilt, enables speculation and amounts to a dragnet thereby permitting the denial of liberty, contrary to Section 1 of the Fourteenth Amendment to the United States Constitution.

Decisions Cited

Thornhill v. Alabama, 310 U. S. 88, 97-98

Lanzetta v. State, 306 U .S. 451

Herndon v. Lowry, 301 U. S. 242

Connolly v. General Const. Co., 269 U. S. 391, 392

United States v. Cohen Groc. Co., 255 U. S. 81

Internat'l Harvester Co. v. Kentucky, 234 U. S. 216

Standard etc. v. Waugh Chemical, 231 N. Y. 51

EIGHTH

The existence of state of war in which the nation is engaged does not limit, suspend or shorten the Bill of Rights or the Fourteenth Amendment, but does permit broadening of legislative powers which must first support in direct and specific needs of the fields to which extended, and the terms of the statute do not directly pertain to any such needs.

Authorities Cited

Laski, *Liberty in the Modern State,*
pp. 56-57, 115, 123, 124-125

Wilson v. Russell, 146 Fla. 539, 1 S. 2d 569

Milligan, Ex parte, 4 Wall. 2, 18 L. Ed. 281, 295

Milk W. D. Union v. Meadowmoor Dairies,
312 U. S. 287, 320

United States v. Carolene Prod. Co.,
304 U. S. 144, 152-153

Discussion of the Statute in Question and of Federal Questions Presented

We have thoroughly discussed the validity of the statute in question in the Jurisdictional Statement filed in the companion case of *Taylor* v. *State of Mississippi* and incorporate the same herein by reference. In the case at bar the dissenting opinions of Judge Alexander and Chief Justice Smith contain excellent discussion of the invalidity of the statute *as construed and applied* to appellant in this case and reference is made to them. (R. 132-144) See also appendix pages 31-43 of this jurisdictional statement.

For the above reasons we submit that the Supreme Court of Mississippi has committed fundamental error and ruled directly contrary to applicable decisions of this Court and has so far departed from the usual and ordinary course and path of constitutional law as to require the exercise of this Court's jurisdiction to correct the same.

Conclusion

For sake of brevity, reference is here made to Petition for Appeal filed in this cause, which we incorporate herein by reference, together with each and every assignment of error therein contained and hereby make same a part hereof to show that substantial questions were presented before the Supreme Court of Mississippi.

WHEREFORE the Supreme Court of the United States should note jurisdiction of this cause for final hearing in accordance with rules of this Court and upon hearing should reverse the judgment of the court below.

Respectfully,

G. C. CLARK
Waynesboro, Mississippi

HAYDEN C. COVINGTON
117 Adams St., Brooklyn, N. Y.

Attorneys for Appellant

APPENDIX A

Opinion

IN THE SUPREME COURT OF MISSISSIPPI
No. 35155
IN BANC

CLEM CUMMINGS v. THE STATE

(Opinion rendered January 25, 1943)

ROBERDS, J.

This case is controlled by the opinion this day handed down in the case of Taylor v. State, No. 35143.

We desire to again emphasize, as we tried to emphasize in that case, that the Mississippi statute does not attempt to coerce, control or direct, in the slightest degree, the conscience or religious beliefs of any person. So far as that statute is concerned, one may believe in and worship a Divine Being, or any ideal or thing the worshiper may think divine, under the name of Jehovah, or any other name; or, on the other hand, he is free to worship satan, a golden calf, any animal or thing, or any image of anything, real or imaginary. What the statute does prohibit is the going about into the homes and among the people, and, by affirmative teaching and action, attempting to persuade the people, at this tragic time, to have disrespect for and disloyalty towards the flag and the state and the nation, and to evince an attitude of disobedience to the laws of the land, thereby undermining the war efforts of the state and national governments. The statute does not command any one to salute the flag or do anything else; it simply demands that people shall not engage in certain affirmative activities which the sovereign state, through its legislature, has determined are harmful to other

people and to the public welfare and to the defensive war efforts of the state and nation.

Appellant was indicted for doing the things prohibited by the statute, and the jury found on sufficient evidence that he did them.

AFFIRMED.

[SAME TITLE: separate opinion as follows:]

GRIFFITH, J., concurring.

Teaching that to salute the National flag is an act of idolatry, and that the consequences of such an act is eternal damnation, is a pointed symptom of the disease which lies at the bottom of the subversive and destructive doctrines which this appellant and his co-workers are seeking to spread in our state in this time of war, the result of which means everything to us as a state and nation. We must look behind technical obscurities and to the substance of things. If appellant may maintain the right so to teach it and urge it among the soldiers and marines wherever access may be had to them; and if our soldiers were to refuse to salute the flag wherever unfurled, and particularly when the military regulations require them to do so, then we would have an army and a navy which would be entitled to no respect at home or abroad; and whoever teaches that which, if followed, would bring our armed forces into such disrespect ought well to be in the penitentiary, as the statute appropriately declares.

[SAME TITLE: another separate opinion as follows:]

SMITH, C. J., *dissenting.*

I concur in what Judge Alexander has here said, but I am also of the opinion that it is not necessary to determine the constitutionality vel non of this statute for if it is valid its "respect for the flag" provision was not here violated. The language used, and that which the appellant here taught, must be such as "reasonably tends to create an attitude of stubborn refusal to salute, honor or respect the flag". The word "stubborn", which qualifies the word "refusal", must be given some effect. One of the definitions given by the lexicographers thereto, and which its context requires to be given here, is: "unreasonably unyielding". State v. Butler, 96 Ore. 219, 186 Pac. 55. The reason given by this appellant for not himself saluting the flag and teaching others that it is wrong to do so, is based on his interpretation of the Holy Scriptures, according to which such a salute is an act of obeisance to a graven image forbidden by the First and Second Commandments and his belief that these Commandments are still in force. A most "reasonable reason" for not giving the salute. We may differ with the appellant in his interpretation of these Commandments, and I personally do, nevertheless that is a matter for his own determination and not for the determination of the judges of this or any other court.

ALEXANDER and ANDERSON, JJ., concur in this opinion.

[SAME TITLE: another separate opinion as follows:]

ALEXANDER, J., *dissenting.*

Appellant was convicted under an indictment which charged him with distributing a book entitled "Children" which it was alleged "reasonably tended to create an attitude of stubborn refusal to salute, honor or respect the flag or Government of the United States or of the State of Mississippi." The statute under which it is drawn is Chapter 178, Laws of 1942, which is set forth in the controlling opinion in the companion case of Taylor v. State, decided this day. The evidence was restricted to and the conviction based upon the alleged teaching that members of the sect to which appellant belonged could not, consistently with their beliefs, perform the ceremony of a salute to the flag. To one unsympathetic with the mysticism of its creed, it can, and perhaps often is, divested of its religious aspect and thereupon attacked as mere subtle political propaganda. The record does not justify a conclusion that appellant's adherence to its teachings, whether blind or rational, was not sincere. It is clear that the advocacy of the doctrine of non-salute is allegedly based upon an interpretation of scripture. The book was written long before this Nation entered the present war. Both the book and the appellant himself, while professing allegiance to and respect for the flag, conceded the right of non-adherents to follow their own convictions. A careful reading of this book fails to impress me that it teaches dishonor to the flag but respect for a faith.

My interest in and inquiry of the matter is therefore confined to two propositions: 1) Does the literature come within the condemnation of the statute, and 2) if so, is the appellant, the sincerity of whose advocacy thereof is conceded, protected against its compulsions

by United States Constitution, Articles 1 and 14, and by Mississippi Constitution, Section 13.

The first utterance in the Federal Bill of Rights forbids the prohibiting of the free exercise of religion. Such prohibition is made effective against state action by the 14th Amendment. In the Bill of Rights of our own State Constitution, the right of freedom of speech and of the press is declared 'sacred'. Mississippi Constitution, Sections 13 and 18.

In this connection, it is sufficient that certain primal verities of personal liberty be recognized by their mere mention. Freedom of conscience and of the press, purchased in the cruel coinage of persecution survived oppression and suppression, and after breaking down the last barriers of an exercise conceded only under license, they emerged triumphant in the purpose of the founders of our republic who had sought shores where the pursuit of happiness would be unhindered by ecclesiastical or political restraints. "Religious views are not vouchsafed by the leniency of the state but upon natural indefeasible rights of conscience." Bloom v. Richards, 2 Ohio St. 390; Lovell v. Griffin, 303 U. S. 444; Schneider v. State, 308 U. S. 147; State v. Greaves, 112 Vt. 222; Zimmermann v. Village of London, 38 Fed. Sup. 582. The founders thereupon made solemn declaration of such rights as being held not at the behest of the state but as endowments of their Creator and as such, unalienable because inherent. Such rights therefore antedated governments which in turn were instituted among men to secure them. Chance v. Miss. Textbook etc. Board, 190 Miss. 453, 200 So. 706; Sullens v. State, 191 Miss. 856, 4 So. 2d 356. It was made clear that the government was held to derive its just power from the consent of the governed. Whereupon, the people of the United States ordained their Constitution for the lofty purpose, among others, to insure

domestic tranquillity, and to preserve these blessings of liberty not only to themselves but to posterity, of which appellant is now a part.

Even as the several states reserved all powers not granted to the national government (U. S. Constitution, Article 10), so the citizens reserved all powers not granted to the state (Mississippi Constitution, Article 3, Secs. 5, 32) Liberty remained the sovereignty of the people. It includes all rights held to be unalienable so that in examining the issue here involved, it is as important to examine whether the state has infringed the creed of appellant as to determine whether his creed has violated the laws of the land.

A consonance between creed and conduct is one of the ends sought in the pursuit of happiness, which in the last analysis is the ultimate goal of the citizen and is a prerequisite to both individual and national tranquillity and the blessings of liberty. Whitney v. California, 274 U. S. 357, 375; Cooley, Constl. Lim. 8th Edn., p. 3. Even the safety of the republic as the supreme law must be acknowledged to rest not alone upon its power for a common defense against outside forces but upon maintaining the general welfare. In this pursuit of personal happiness, life is its condition and liberty is the avenue of its achievement. The courts must preserve it intact as a dependable causeway lest by its collapse it become a barricade. Even as liberty is guaranteed to the people, the courts must in turn guaranty life to this liberty. This happiness may not be allowed to be pursued over the crushed convictions of others whose contentment is dependent upon their right to indulge their own beliefs despite their novelty or absurdity. Happiness like disloyalty can not be judicially defined. Each must remain an abstraction subject to definition by the individual. The dilemma with which the courts are often confronted in such cases as we now

have is that they are apt to seek to define objectively things which are of necessity purely subjective. Pound, Law and Morals, p. 107. There is no prescription for either which the law can write. In the words of a familiar maxim, liberty is the power of doing what the law permits. Law is found to be a means to restrain or regulate liberty, and in this sense what the law does not forbid it sanctions. As hereafter discussed, the state can regulate conduct but not creed; it can fetter the hand but not the heart. Pound, op. cit. supra. p. 68; 4 Bl. Com. 21; Commonwealth v. Kennedy, 170 Mass. 18.

So that, it is not only the disability of the state to control conscience but the impropriety that it should attempt to do so which has been recognized in our laws and judicial decisions. The right in the name of conscience to 'affirm' instead of 'swear' in all oaths, to object to active combat military service, and the disqualification for jury service in capital cases are illustrations. If it be urged that these exemptions are recognized by positive statutes, it is an answer that the initial duty, performance of which is absolved, is also decreed by positive statutes. It is as egregious a political incongruity for the state to punish apostasy as that treason should seek to justify itself by conscience. Between the two extremes where on the one hand the state is bound to protect its morals and safety despite religious disapproval, and on the other, where the citizen is free to follow his conscience despite the welfare of the state, there is an area which has ever been the embattled forum both of theorists and judges. Whether the literature disseminated and the opinions expressed by appellant, considered in the light of religious teaching, falls above or below an ascertainable line of demarcation is part of our present task.

History furnishes too many instances where atheism has preached political orthodoxy and where creedal

orthodoxy has taught political heresy for us to regard the persons of men or their affiliation with a particular sect. Since the acts of appellant are not shown to have been instigated by an illegal connivance and his opinions and teachings appear solely the compulsions of his own conscience, I do not think it is relevant to discuss nor mention the sect to which he belongs. Much of the odors of prejudice which hover about appellant seem to cling to the garments of his own peculiar cult into which a dissentient populace has breathed its disapproval. Disrobed of his identifying raiment, he is revealed as a citizen of the United States and of the State of Mississippi, and it is in his status as such that he is entitled to be judged. Meador v. Hotel Grover, 9 So. 2d 782, 786; De Jonge v. U. S., 81 L. Ed. 278. Our duty is not to approve nor condemn a ritual but to protect a freedom. We are not called upon to heed the voices of those who, smarting under what they deem a righteous resentment, would choose to display their own loyalty by casting appellant into the fiery furnace of a public's scorn. Neither should this Court extend its arm to defend zealotry against the right of prejudice to speak its frenzied piece. It must direct its solicitude toward the possibility that, in striking against hands which, however justified, are grasping the torch of liberty it may thereby quench the light itself. Of all the actors in this scene, it is the Court alone which is not free but must function in a field of constitutional limitations which are at once a confinement of liberty and a protecting barrier against its invasion. We may not indulge the popular privilege of obeying impulses whose sanction is solely in a love of country. We may inquire only whether the law compels that which this love demands. The one is as free to exhibit his derision as the other is to manifest his devotion. That personal liberty which the state concedes to one to vent his grievance in a

fervid indignation is thus made available to the other in his right to exhibit his consecration in what he deems a righteous martyrdom. The wisdom of neither is any concern of the courts. Truth and sanity must be given both the liberty and responsibility to fend for themselves. Watson v. Jones, 80 U. S. 728, 70 L. Ed. 666; Sullens v. State, supra. The folly of today may be tomorrow's wisdom, and charges of heresy are apt to disclose not so much the status of the condemned as the outspoken reaction of the accuser. Free speech is not a special privilege of the critic. In a companion case this day decided (Taylor v. State), the controlling opinion denies to the appellant the right to invest the salute with a religious aspect. By such view, the Court arrogates to itself the right to define religion for the citizen. But religion is essentially subjective. We are without right or power to say that withholding salute to the flag cannot relate to religion unless we mean our own religion. If we assume authority to say that they must be put asunder, we must at the same time concede the right of others equally privileged to join them together. The dictates of conscience are dictated by and not to the conscience. In Barnette, et al. v. The West Virginia State Board of Education (decided Oct. 6, 1942, by a three judge court, So. Dist. W. Va.), the court said "The salute of the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law." A unity of popular approval in a ceremony of salute is eminently desirable, but it is of greater importance that the unity which the Court may protect remain the only one which in a land of diverse races, creeds and philosophies can be maintained—a unity of a common possession of equal rights. The sentiment of our people's pledge to the flag

—'One nation indivisible with equality and justice for all'—implies not a people undivided in their opinions but undivided in equality and justice. "No country or no society can be conducted by partly acknowledging the securities of liberty and partly denying them, nor by recognizing some of them and denying others. That is part democracy and part tyranny." Hoover, The Challenge to Liberty, p. 198. Freedom of conscience and of religion are absolute. Cantwell v. Connecticut, 310 U. S. 296, 84 L. Ed. 1213.

Homage to the flag, like disloyalty, in the absence of an established legislative ritual is what the citizen thinks it is. Even as the state may not compel an affiant to swear, and yet may punish his perjury, all that it may require, in the absence of positive law, as to loyalty, is not that it manifest itself in a regimented ceremony but that it remain loyalty. The statute here seeks to punish 'disloyalty' and undertakes to define it in terms of an attitude of stubborn refusal to salute the flag. The controlling opinion in the Taylor case (supra) has defined the word 'stubborn'. I see no reason to assume that the Legislature was unaware of its connotation nor to impute to it any purpose other than to recognize the rights of those who, not stubbornly nor arbitrarily, were 'ready always to give . . . a reason of the hope that is in' them. To assume that the refusal to salute is stubborn and to argue therefrom that such course is a symptom of a deep-seated disloyalty is to punish one not for the charge against him but for the evidence adduced to prove it. It is of interest to note in this connection that this 'symptom' was revealed by the resourcefulness of the prosecutors who at the preliminary hearing displayed in the courtroom a large American Flag and at an opportune moment requested all present to stand and salute. The convictions of appellant were thus 'smoked out' when he remained

seated and became at once a witness to his convictions and for the state.

I see no reason to curb the impulse to reveal a complete accord with any act or ceremony which tends to invest the symbols of our freedom with homage and respectful awe. Yet in the light of that common sense which remains the back-log of all the fires of popular enthusiasm, it can clearly be seen that if one be compelled to salute our flag under coercion it would do no good, and if he refrain under conscience it would do no harm. Thomas Jefferson wrote in 1789 "I am persuaded that the good sense of our people will always be found the best army." Hart, Formation of the Union, p. 140. No one who is able to recall how betrayal can be symbolized by a salute of affection may gainsay the plain truth that loyalty is a matter not of the act but of the attitude. To withhold judicial condemnation of a conscientious refusal to salute as disloyalty is to recognize not the confounding of but the fundamental separation between the homage due the 'things of God' and those 'of Caesar.' So that the issue in the present case becomes not one of salute *vel non* but loyalty *vel non*.

In this connection, it is appropriate to review the attitude of Gen. Washington expressed in a letter to General Lafayette in connection with conscientious refusal of officers of a Virginia brigade to take an oath of allegiance to the Union. "As every oath should be a free act of the mind founded on the conviction of the party of its propriety, I would not wish in any instance that there should be the least degree of compulsion exercised, or to impose my opinion in order to induce any to make it of whom it is required. The gentlemen therefore who sign the paper will use their own discretion in the matter and swear or not swear as their conscience

and feelings dictate." Sparks, Life of Washington, Life of Washington, Vol. 5, p. 366.

The literature described in the indictment should not judicially be held to create an 'attitude of stubborn refusal to salute the flag.' Its expressed purpose is to gain adherents to their sect and the import of the references to the flag must be construed in the light of the pledge of allegiance therein advocated. Any refusal is not therefore the fruit of a stubborn or arbitrary disdain but is the considered resultant of the forces of conscience. Gilbert v. Minnesota, 254 U. S. 325, 65 L. Ed. 287. It is true that the consciences of its converts as such are taught that the salute implies disobedience to divine command, but it concedes to all others the right to follow any regimen which a popular will sanctions as patriotic or proper. It is interesting to note that in this regard a tolerance is shown which their own detractors may concede to be a trait to which without hurt they might subscribe. Although I have adverted to the requirement of the statute that the refusal to salute must be stubborn before it can be defined as disloyalty, these views are based on the fundamental ground that even disloyalty, to be punished, must itself be defined in terms which will furnish a sufficiently ascertainable standard of guilt. Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066. Moreover, the Act of 1942 leaves disloyalty to be defined according to the wisdom or whim of the trial jurors. Chief Justice Ellsworth once charged a grand jury in regard to subversive acts that "it was not necessary that Congress should define the offense but that the rules of a known law matured by the reason of ages and which Americans have ever been tenacious of as a birthright, you will decide what acts and misdemeanors on the ground of their opposing the existence of the national government" you should prosecute. This novel view was, however, repudiated in

U. S. v. Hudson, 7 Cranch. 32, 3 L. Ed. 259, where the Court said "The legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense." Paterson, Free Speech and a Free Press, p. 130. We have no statute requiring a salute to the flag.

In the dissent in the Taylor case (supra) some elaboration is made of the further requirement that the act or conduct advocated must create a clear and present danger that by force or violence the orderly processes of the government will be subverted. There is there discussed also the effect of the war emergency as requiring a readjusted standard for defining the elements of sedition.

In the hearing of the case of Minersville School Dist. v. Gobitis on its first appeal (108 Fed. 2d 683) the Court of Appeals stated that "the salute in this case is very like that of the Hitler regime." In the light of this intimation, the verity of which we do not pause to consider, let it be supposed that under the stress of war psychology ninety per cent of our citizens should borrow from the vague philosophies of defendants' literature the fear that a compulsory salute to the flag smacks too much of a fascism in which the symbols and representatives of a people become deified, would the remaining ten percent be entitled to protection in their claim to a freedom thus to continue to show it homage? There can be but one answer. Constitutional rights are not subject to nullification by reference to a popularity poll. Men's consciences may not be held hostage by the state to compel conformity to a majority view.

The act under which appellant was convicted does not require that the flag be saluted in any prescribed manner. Some courts have held that it may not do so. Kansas v. Smith (Kan.), decided July 11, 1942; Kennedy v. City of Moscow, 39 Fed. Sup. 26; Reid v.

Brookville, 39 Fed. Sup. 30. The Gobitis case (310 U. S. 586) held that a public school had authority as such body by its regulations to compel pupils to salute the flag and to punish disobedience by expulsion. Putting aside the inapplicability of the decision to the present case (as to which, compare Clark v. State, 169 Miss. 369, 152 So. 820; 16 C. J. S. 559), it is noteworthy that one of the justices in the Gobitis case dissented and that in Jones v. City of Opelika, 62 Sup. Ct. 1231, 86 L. Ed. 1174, three of those who joined in the majority opinion in the former case stated that "We think this is an appropriate occasion to state that we now believe it was wrongly decided." Our attention has been called to a recent case Barnette v. The W. Va. State Bd. of Edu., decided Oct. 6, 1942, by a three judge court for the Southern District of West Virginia. This tribunal in recognition of the present attitude of the Gobitis case as a precedent refused to follow its holding.

The statute under consideration undertakes to punish those who "either by word or deed weaken the morale or unity of our people or adversely affect their honor and respect for the flag or government of the United States or of the State of Mississippi." It declares that such persons "are a menace to the safety of this state." The specification as to a refusal to salute the flag is thereby made a conclusive presumption of both menace and disloyalty. Whether the legislature may constitutionally go this far need not be decided since we are considering only the implied exemption in favor of religious freedom. Nor need we discuss the contention that the form of and occasion for the salute is not prescribed; nor that there is lacking even a general understanding of a public sanction thereof as a dictum of civilian etiquette. We withhold comment also upon the recent Act of Congress (Sec. 7, Act, Cong.

June 22, 1942, Public No. 623) which although requiring the salute for those in military service, adds: "However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress." As heretofore stated, our citizens as such are as free to construe a failure to salute as disloyalty, as are appellants to construe it as idolatry.

This Court need not restrain its expression of reverence for our Nation's flag. It need not enlarge its ready witness thereto by eulogy or apostrophe, although materials for an ample encomium are not wanting and lend themselves to fluency. Nor may the concept be denied expression that the flag is paid its sincerest homage when it is confidently left free to inspire the spontaneous respect of minds which themselves are free. The courts may control what its citizens do to our flag but not what the flag does to them.

Anderson, J., and Smith, C. J., concur in this opinion.

APPENDIX B

Stipulation

IN THE SUPREME COURT OF MISSISSIPPI

R. E. TAYLOR, Appellant, v. STATE OF MISSISSIPPI	No. 35143
CLEM CUMMINGS, Appellant, v. STATE OF MISSISSIPPI	No. 35155
BETTY BENOIT, Appellant, v. STATE OF MISSISSIPPI	No. 35163

Now come Appellants, R. E. Taylor, Clem Cummings, and Betty Benoit, by and through their attorney, Hayden C. Covington, and the Appellee, The State of Mississippi, through its attorney, George H. Ethridge, Assistant Attorney General, and stipulate as follows:

In order that these appeals may be submitted to the United States Supreme Court on the merits at the present term, it is agreed that the appellee, The State of Mississippi, waives its right to file a statement disclosing any matter or ground making against the jurisdiction of the United States Supreme Court asserted by the appellants in their jurisdictional statements and reserves the question of whether or not the cases should be dismissed for "want of substantial Federal question" for consideration of the Federal questions presented on a hearing of these causes on the merits and oral argument thereof before the United States Supreme Court.

Dated: February 23, 1943.

Hayden C. Covington	George H. Ethridge
Attorney for Appellants	Attorney for Appellee